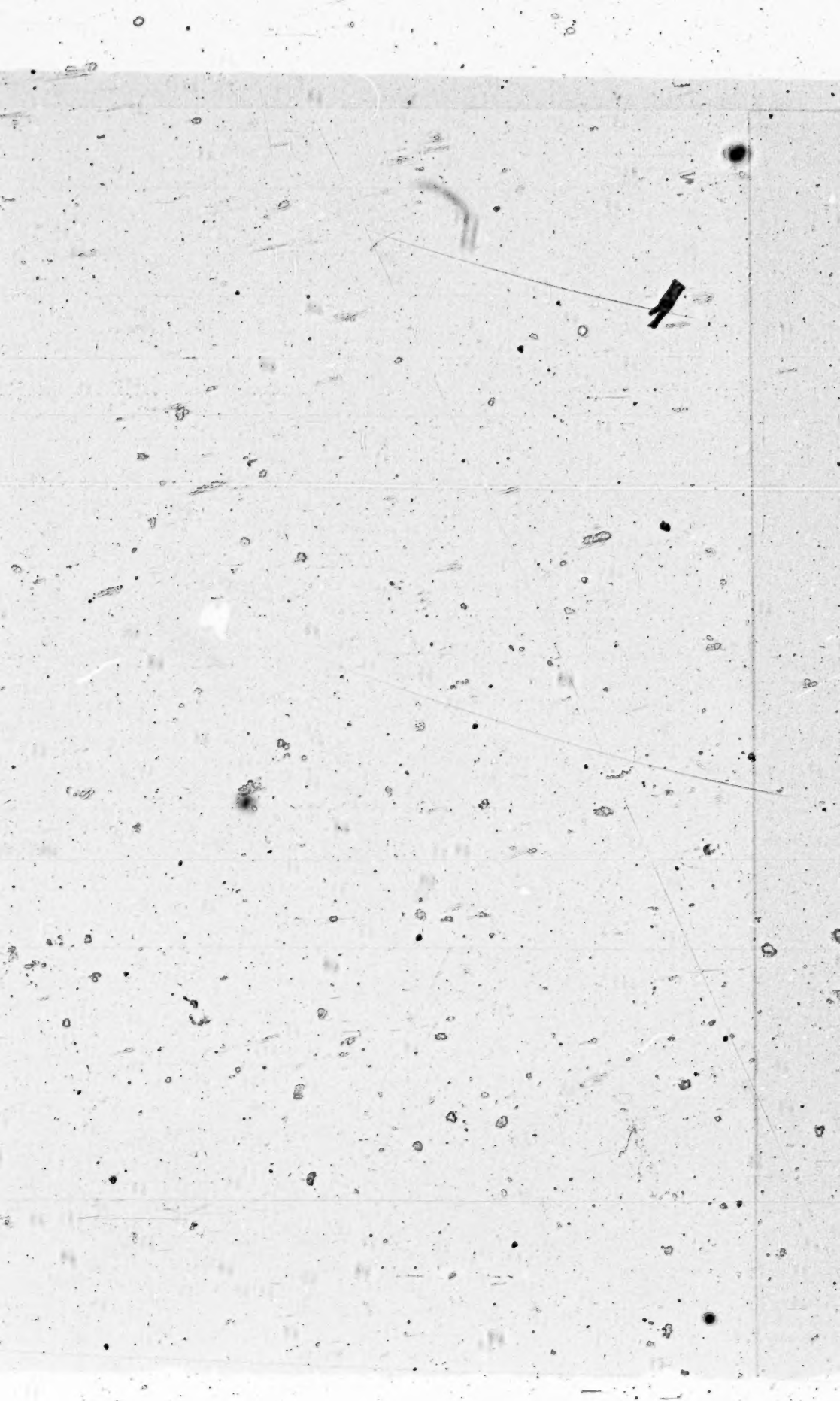

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE, PETITIONERS

v.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

All of the petitioners are aliens who, prior to the passage of the Internal Security Act of 1950, had been arrested on warrants of deportation and enlarged on bail pending the determination of their deportability. In each case, the basis for the warrant, pursuant to the Immigration Act of 1918, was that the alien, after entry, was found to be a member of an organization which believes in,

advises, advocates and teaches the overthrow by force or violence of the Government of the United States (R. 45, 94-95, 135, 165).

The Internal Security Act of 1950 specifically made membership in the Communist Party after entry ground for deportation [1] and provided that:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General * * * [2]

After passage of the Act, the Attorney General ordered the petitioners to be re-arrested and detained without bail pending the determination of their deportability (R. 42). New warrants of deportation were issued based on the ground that the aliens after entry were members of the Communist Party of the United States (R. 12, 81, 127, 168).

The petitioners sought release on bail by means of a petition for a writ of habeas corpus which attacked the validity of the Attorney General's action. The petition in each case alleged that the petitioner had lived within the jurisdiction of the United States for an extended period of time; that he had engaged in a lawful occupation and had

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[1] 8 U.S.C. 137-3.
[2] 8 U.S.C. 156(a).

always behaved in a law-abiding manner; that he had strong family ties in this country; and when previously free on bond he had reported for hearings as required and had at all times made himself available (R. 1, 68, 114, 151). The petition, in each case, contended that the Attorney General's action in confining the petitioner without bail was an abuse of the discretionary power of the Attorney General (R. 5, 73, 122, 156), a denial of due process in violation of the Fifth Amendment to the Constitution (R. 7, 75, 122, 157), and a denial of bail in violation of the Eighth Amendment (R. 7, 75, 122, 157).

The Director's return to the order to show cause stated the reason for the denial of bail in each case to be "that there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States" (R. 11, 79, 125).

The District Court held that the action of the Attorney General in denying bail was reviewable (R. 20), but that the burden was upon the petitioners to show that the Attorney General had been unreasonable and had abused his discretionary power. Since the petitioners offered no evidence to this effect, the District Court held there had been no abuse of discretion and dismissed the proceedings (R. 23, 24). 94 F. Supp. 18 (S.D. Cal.).

On appeal, the Court of Appeals reversed and

remanded on the ground that the Director's return was insufficient in that it had not mentioned any facts upon which a determination could be made that the Attorney General had acted on reasonable grounds (R. 35, 28-37). 186 F. 2d 183 (C.A. 9).

At the second hearing, the Director filed a new return in which he alleged that each of the petitioners had, after entry, been a member of the Communist Party of the United States (R. 43, 93, 133, 164). To this return the Director appended affidavits verifying the petitioners' active leadership in the Communist Party program (R. 45, 95, 136, 166).[3] The District Court held that this was

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[3] (a) With respect to petitioner Carlson the respondent's affidavit stated among other things that petitioner was editor of the "Young Worker," official organ of the Young Communist League of the United States; that he was a member of the National Executive Committee of the Young Communist League; that he was Secretary and President of the Young Communist League of California; that during the latter part of 1946 until about the summer of 1947, the petitioner was State Secretary of the Communist Party of the United States for the State of Wisconsin; and that in September, 1949 he headed the Marxist Institute in Los Angeles (R. 52).

(b) With respect to petitioner Stevenson the respondent's affidavit stated among other things that petitioner was a Unit Organizer and a member of the Hollywood Subsection Committee of the Communist Party in 1936, that she was secretary of a Communist Party Unit in 1938; and that she was a correspondent of the People's Educational Center in 1948 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 95).

(c) With respect to petitioner Hyun, the respondent's affidavit stated among other things that petitioner was instrumental in reactivating the Communist Party in Hawaii in 1945, that he was a member of the Executive Board of the Communist Party in Hawaii in 1946; that he led and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the Communist Party during the years 1946 and 1947;

a sufficient showing under the decision of the Court of Appeals, and on the failure of the petitioners to offer any evidence to the contrary, the court dismissed the proceedings (R. 64-65, 106, 143, 174-175). The Court of Appeals affirmed, stating that in the light of the findings of Congress expressed in the Internal Security Act of 1950 and the incontrovertible "world-wide conspiracy against free democratic governments by a major world power using as its vehicle the establishment of Communism by force and violence," the return and affidavits were sufficient to show that the Attorney General had not abused his discretionary power in refusing to enlarge the petitioners on bail pending the determination of their deportability (R. 339, 331-350). 187 F. 2d 991 (C.A. 9).

The Government does not oppose the granting of a writ of certiorari in this case since, as pointed out in our petitions for certiorari in *Butterfield*

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that he was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); and that he was educational director of the West Lake Section of the Communist Party in Los Angeles, California in 1949 (R. 136).

(d) With respect to petitioner Carlisle, the respondent's affidavit stated, among other things, that petitioner was a speaker at closed meetings of Communist Party functionaries in 1933; that in 1935 he was editor of the "Western Worker" (the then official Western organ of the Communist Party, U.S.A., Section of the Communist International); that in 1949 he was active in the affairs of the American-Russian Institute and was on its list of approved speakers (said organization has been designated by the Attorney General as Communist, F. R. 315, No. 231) (R. 166).

v. *Zydok*, No. 136, this Term, and *Gordon* v. *Heikkinen*, No. 334 this Term, there is a conflict between the decision of the court below in this case and the decisions of the Courts of Appeals for the Sixth and Eighth Circuits as to the principles applicable to the exercise of discretion by the Attorney General under the Internal Security Act and to judicial review thereof. The *Zydok* decision by the Sixth Circuit (187 F. 2d 802) and the *Heikkenen* decision by the Eighth Circuit (190 F. 2d 16), hold that, in exercising his discretion to grant or withhold bail, the Attorney General is limited to the purpose of assuring the alien's availability, and cannot deny bail on the basis of the alien's Communist activities. The decision in the instant case in effect holds that, in exercising his discretion, the Attorney General may give paramount consideration to national security and may deny bail on the basis of active participation in the Communist party.

It is therefore respectfully submitted that this Court should grant this petition, together with the petitions in No. 136 and in *Gordon* v. *Heikkinen*, in order to resolve the conflict as to the factors which the Attorney General may consider in exercising his discretion to grant or withhold bail.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1951

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